



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MAY 19 2009

**E. Mark Braden, Esquire
Baker & Hostetler LLP
1050 Connecticut Avenue, NW
Suite 1100
Washington, DC 20036**

**RE: MUR 6077
NFIB SAFE Trust**

Dear Mr. Braden:

On September 30, 2008, the Federal Election Commission notified your clients, National Federation of Independent Business's SAFE Trust and Tammy Boehms, in her official capacity as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). On May 6, 2009, the Commission found, on the basis of the information in the complaint, and information provided by you, that there is no reason to believe your clients violated the Act in connection with the alleged coordinated communications and reporting violations in this matter. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

If you have any questions, please contact Audra Hale-Maddox, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in cursive script that reads "Mark Allen".

**Mark Allen
Assistant General Counsel**

**Enclosure
Factual and Legal Analysis**

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: National Federation of Independent Business's
SAFE Trust and Tammy Boehms, in her official
capacity as treasurer

MUR 6077

I. GENERATION OF MATTER

This matter was generated by a complaint filed with the Federal Election Commission by the Minnesota Democratic-Farmer-Labor Party, through its Chairman, Brian Melendez.
See 2 U.S.C. § 437g(a)(1).

II. FACTUAL SUMMARY

The Complaint alleges that the National Federation of Independent Business's separate segregated fund, the Save America's Free Enterprise (SAFE) Trust and Tammy Boehms, in her official capacity as treasurer, ("NFIB" or "Respondents") and Jeff Larson coordinated communications with Norm Coleman ("Coleman"), Coleman for Senate '08 ("CFS") and Rodney A. Axtell, in his official capacity as treasurer, and thereby made an excessive in-kind contribution in the form of the NFIB's newspaper advertisement. The Complaint bases its allegation on an asserted "close knit web of relations" between the identified persons, and an asserted common vendor relationship between the NFIB and Coleman/CFS through Jeff Larson and his company FLS Connect. In addition, the Complaint alleges reporting violations on the part of Respondents.

The NFIB ran a full-page newspaper ad in Minnesota prior to the 2008 U.S. Senate election titled "Take a Quick Quiz and See if You're One of the Minnesotans Who Would Have Their Taxes RAISED by Al Franken," and which contained the NFIB SAFE Trust's endorsement of Norm Coleman. The NFIB's ad ran on September 5, 2008, in the *St. Paul*

1 *Pioneer Press* and the *Minneapolis Star Tribune*, prior to the Minnesota primary election on
2 September 9, 2008. On September 4, 2008, the NFIB disclosed its payment of \$84,426.00 for
3 this ad as an independent expenditure on Schedule E.

4 The available information suggests that Coleman and CFS were not aware of the
5 advertisement produced by the NFIB until the ad appeared in print, and that Coleman and CFS
6 had not been consulted by the NFIB regarding the advertisement prior to its release.

7 Respondents emphasize in a sworn affidavit that FLS Connect did not perform any work on the
8 NFIB ad at issue in this complaint.

9 Accordingly, the Commission finds no reason to believe that the NFIB violated
10 provisions of the Federal Election Campaign Act of 1971, as amended ("the Act") by making an
11 excessive in-kind contribution in the form of coordinated communications. The Commission
12 also finds no reason to believe that the NFIB violated the reporting requirements of the Act.

13 **III. ANALYSIS**

14 Under the Act, no multicandidate political committee, such as the NFIB's SAFE Trust,
15 may make a contribution, including an in-kind contribution, to a candidate and his authorized
16 committee with respect to any election for Federal office, which in the aggregate exceeds \$5,000.
17 2 U.S.C. § 441a(a)(2); *see* 2 U.S.C. § 431(8)(A)(i) and 11 C.F.R. § 100.52(d)(1). No candidate
18 or his authorized committee shall knowingly accept a contribution in excess of such limit. *See*
19 2 U.S.C. § 441a(f). The Act defines in-kind contributions as, *inter alla*, expenditures made by
20 any person "in cooperation, consultation, or concert, with, or at the request or suggestion of, a
21 candidate, his authorized political committees, or their agents." 2 U.S.C. § 441a(a)(7)(B)(i).

22 **A. Coordinated Communications**

23
24 A communication is coordinated with a candidate, an authorized committee, or agent

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thereof if it meets a three-part test: (1) payment for the communication by a third party; (2) satisfaction of one of four "content" standards; and (3) satisfaction of one of six "conduct" standards. 11 C.F.R. § 109.21.

1. Payment

In this matter, the first prong of the coordinated communication test is satisfied as to the NFIB's ads because the NFIB acknowledges having paid for the ad in question. 11 C.F.R. § 109.21(a)(1); *see* NFIB Response at 1.

2. Content

The content prong is satisfied where the communication at issue meets one of the following content standards: an electioneering communication; a public communication that republishes, disseminates, or distributes candidate campaign materials; a public communication containing express advocacy; or a public communication that refers to a clearly identified federal candidate that was publicly distributed or disseminated 90 days or fewer before a primary or general election, and was directed to voters in the jurisdiction of the clearly identified federal candidate. 11 C.F.R. § 109.21(c)(1) - (4).¹

¹ After the decision in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (Court of Appeals affirmed the District Court's invalidation of the fourth, or "public communication," content standard of the coordinated communications regulation), the Commission made revisions to 11 C.F.R. § 109.21 that became effective July 10, 2006. In a subsequent challenge by Shays, the U.S. District Court for the District of Columbia held that the Commission's content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not vacate the regulations or enjoin the Commission from enforcing them. *See Shays v. F.E.C.*, 508 F.Supp.2d 10, 70-71 (D.D.C. Sept. 12, 2007) (NO. CIV.A. 06-1247 (CKK)) (granting in part and denying in part the respective parties' motions for summary judgment). Recently, the D.C. Circuit affirmed the district court with respect to, *inter alia*, the content standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. *See Shays v. F.E.C.*, 528 F.3d 914 (D.C. Cir. June 13, 2008). The activity at issue in this matter occurred after the July 10, 2006, effective date of the revisions to Section 109.21.

1 The public communications portion of the content standard appears to be satisfied as to
2 the NFIB's newspaper ad because the advertisement clearly identifies Coleman and Franken,
3 who were each candidates in the 2008 U.S. Senate election in Minnesota, and because the ad was
4 published within 90 days of the September 9, 2008, primary as well as the November 4, 2008,
5 general election within the State of Minnesota.² See 11 C.F.R. § 109.21(c)(4)(i).

6 3. Conduct

7 The six conduct standards of the coordinated communication test include situations in
8 which the communication is created, produced, or distributed 1) at the request or suggestion of
9 the candidate, his committee, or an agent thereof; 2) with the material involvement of the
10 candidate, the committee, or agent; 3) after a substantial discussion with the candidate,
11 committee, or agent; 4) by a common vendor; 5) by a former employee or independent
12 contractor; or 6) via republication of campaign material. 11 C.F.R. § 109.21(d).

13 The Complaint alleges that the advertisement at issue "may also meet the third prong" of
14 the test, stating that the "close-knit web of relations between Senator Coleman, the Chamber,
15 NFIB, Jeff Larson, and FLS-Connect ... taken together, support the inference that the
16 advertisement[] [was] produced at the request of Senator Coleman or his agent, with Senator
17 Coleman's material involvement, or after substantial discussion with Senator Coleman or his
18 agent." Complaint at 4-5; see 11 C.F.R. § 109.21(d). Available information indicates that
19 Larson and Coleman have many connections, including 1) Larson's service as a long-time
20 advisor for Senator Coleman, 2) Larson's service as the treasurer of Coleman's Northstar
21 Leadership PAC, and 3) Coleman's employment of Larson's wife in one of his local constituent

² NFIB filed an independent expenditure report disclosing its payment for the ad. See FEC Form 3X filed by National Federation of Independent Business/Save America's Free Enterprise Trust, dated September 4, 2008.

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1 offices in Minnesota. The Complaint alleges that Coleman, CFS, the Chamber, and NFIB have
2 all been clients of Larson's firm, FLS Connect, and that the coordination took place through
3 Larson as Coleman's agent. See Complaint at 5. The Complaint further cites this business
4 relationship to support an allegation of coordinated communications through FLS Connect as a
5 common vendor. *Id.* The available information does not support the Complaint's allegations.

6 Addressing complainant's last allegation first, a vendor is a "common vendor" for the
7 purposes of the Act only if the same vendor creates or distributes the ad alleged to be
8 coordinated and, within 120 days, has provided specified services for the candidate alleged to
9 have benefitted from the coordination. See 11 C.F.R. § 109.21(d)(4). The available information
10 does not indicate that Jeff Larson contracted for, or otherwise participated in, the creation,
11 production, or distribution of the NFIB's advertisement related to the 2008 Minnesota Senate
12 campaign, or otherwise acted as a coordinator for this communication. More broadly, the
13 Response denies that FLS Connect performed any work at all for the NFIB during the 2008
14 election cycle. See NFIB Response at 2 and attached Affidavit of NFIB vice-president Lisa
15 Goeas at ¶2.

16 To fulfill the common vendor standard of the conduct prong, it is not sufficient for the
17 entities involved to have merely hired the same commercial vendor for different work at various
18 points in the past. Instead, the common vendor must be performing work for the candidate or the
19 candidate's committee within 120 days of creating, producing, or distributing the specific
20 communication(s) alleged to have been coordinated, see 11 C.F.R. § 109.21(d)(4)(ii). Thus, the
21 available information indicates that FLS Connect is not a common vendor for the purposes of the
22 Act.

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1 In response to the Complaint's inference that the advertisement was produced at the
2 request of Senator Coleman or his agent, with Senator Coleman's material involvement, or after
3 substantial discussion with Senator Coleman or his agent, Respondents deny any involvement
4 by, or coordination with, CFS or any agent thereof in the creation or distribution of the ad.
5 See 11 C.F.R. § 109.21(d)(1)-(3). The NFIB denies seeking or gaining any information from
6 Coleman or CFS for the ad, and it denies using Jeff Larson or FLS Connect in any way in the
7 preparation and dissemination of the ad. See NFIB Response at 1-2 and Affidavit of NFIB vice-
8 president Lisa Gocas at ¶¶ 2 and 5.

9 There is no other support offered for the Complaint's allegation as to the coordinating
10 conduct. Unwarranted legal conclusions from asserted facts, or mere speculation, will not be
11 accepted as true, and "[s]uch speculative charges, especially when accompanied by direct
12 refutation, do not form an adequate basis to find reason to believe that a violation of FECA has
13 occurred." Statement of Reasons in MUR 4960 (Hillary Rodham Clinton for U.S. Senate
14 Exploratory Committee), issued December 21, 2000 (citations omitted). Here, Complainant's
15 inferences are convincingly refuted by the available information including the response of the
16 NFIB, which denies any coordinating activity. The conduct prong of the coordinated
17 communications test does not appear to be fulfilled in this matter, and so the NFIB's
18 communication does not appear to have been coordinated with Coleman or CFS. Accordingly,
19 the NFIB does not appear to have made an excessive in-kind contribution. See
20 2 U.S.C. § 441a(a)(2).

21 B. Reporting Violations

22 The Complaint suggests that if the communication at issue is found to be a coordinated
23 communication, then Respondents failed to disclose the resulting contribution. See

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2 U.S.C. § 434. As there appears to be no support for a finding that the communication in this case was coordinated, there is no reason to believe Respondents violated the reporting provisions of the Act.

C. Conclusion

For the reasons set forth above, the Commission finds no reason to believe that the National Federation of Independent Business's separate segregated fund, the Save America's Free Enterprise (SAFE) Trust and Tammy Boehms, in her official capacity as treasurer, violated the Act in connection with the alleged coordinated communication.

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